HON'BLE THE CHIEF JUSTICE SRI G.S. SINGHVI
AND
HON'BLE SRI JUSTICE C.V. NAGARJUNA REDDY

Writ Petition No.26837 of 2003

Between:

Ashok Sharda

… Petitioner

And

Small Industries Development Bank of India
Represented by its General Manager and others

… Respondents

:: ORDER::

Counsel for the Petitioner: Shri T.V.L. Narasimha Rao

Counsel for Respondent No.1: None

Counsel for respondent No.2: Shri D. Raghavulu for
Shri K.B. Ramanna Dora

Counsel for respondent Nos.3 & 4: None

July 27, 2007

-
-

Per G.S. Singhvi, CJ

With a view to give impetus to the industrial development of the country, the Central and State Governments encouraged the banks and other financial institutions to formulate liberal policies for grant of loans and other financial facilities to the industrial entrepreneurs. However, those who were granted these facilities did not bother to repay the loans etc. and whenever efforts were made for recovery of the dues, the defaulters dragged the banks etc. in the Courts. The tardy progress made in the adjudication of litigation filed in the Civil Courts resulted in blockage of several hundred crores of public money. In order to redeem the situation, the Parliament enacted the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (for short, 'the 1993 Act') which, among other things, paved way for creation of specialized forums i.e. the Debts Recovery Tribunals and the Debts Recovery Appellate Tribunals for expeditious adjudication of disputes relating to the recovery of debts dues of banks and public financial institutions. The 1993 Act also created a bar to the entertaining of civil suits in matters involving recovery of the dues of the banks etc. For few years, the new dispensation of adjudication worked well but with the passage of time, the proceedings before the Debts Recovery Tribunals also become akin to those of Civil Courts. This was mainly due to the fact that the Presiding Officers of the Tribunals, who were drawn from the judicial services, allowed the representatives of the debtors to adopt dilatory tactics which are used for prolonging litigation in the Civil Courts. The survey conducted by the Ministry of Finance, Government of India revealed that as in 2001, a sum of more than Rs.1,20,000/- crores was due to the banks and

financial institutions and the economy of the country was adversely affected on that account. Therefore, the law makers felt that stringent provisions should be made for ensuring speedy recovery of dues of banks, public financial institutions and other secured creditors. To achieve this objective, the Parliament enacted the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short 'the 2002 Act'). The new enactment is supposed to be free from the trappings of the Civil Courts. With a view to ensure that the provisions contained in other laws do not act as impediment in the recovery of dues of the banks etc., a non-obstante clause has been incorporated in Section 35 and over-riding effect has been given to the provisions of the 2002 Act vis-à-vis all other legislations. However, comprehensive implementation of the new legislation could not be done for more than two years because the vires of the 2002 Act was challenged in various High Courts and the Supreme Court and was finally decided in 2004 in **Mardia Chemicals v. Union of India**[1]. Some of the observations made in that judgment are very significant. Therefore, the same are extracted below:

> "Some facts which need to be taken note of are that the banks and the financial institutions have heavily financed the petitioners and other industries. It is also a fact that a large sum of amount remains unrecovered. Normal process of recovery of debts through courts is lengthy and time taken is not suited for recovery of such dues. For financial assistance rendered to the industries by the financial institutions, financial liquidity is essential failing which there is a blockade of large sums of amounts creating circumstances which retard the economic progress followed by a large number of other consequential ill effects. Considering all these circumstances, the Recovery of Debts Due to Banks and Financial Institutions Act was enacted in 1993 but as the figures show it also did not bring the desired results. Though it is submitted on behalf of the petitioners that it so happened due to inaction on the part of the

Governments in creating Debts Recovery Tribunals and appointing presiding officers, for a long time. Even after leaving that margin, it is to be noted that things in the spheres concerned are desired to move faster. In the present-day global economy it may be difficult to stick to old and conventional methods of financing and recovery of dues.

Hence, in our view, it cannot be said that a step taken towards securitisation of the debts and to evolve means for faster recovery of NPAs was not called for or that it was superimposition of undesired law since one legislation was already operating in the field, namely, the Recovery of Debts Due to Banks and Financial Institutions Act. It is also to be noted that the idea has not erupted abruptly to resort to such a legislation. It appears that a thought was given to the problems and the Narasimham Committee was constituted which recommended for such a legislation keeping in view the changing times and economic situation whereafter yet another Expert Committee was constituted, then alone the impugned law was enacted. Liquidity of finances and flow of money is essential for any healthy and growth-oriented economy. But certainly, what must be kept in mind is that the law should not be in derogation of the rights which are guaranteed to the people under the Constitution. The procedure should also be fair, reasonable and valid, though it may vary looking to the different situations needed to be tackled and object sought to be achieved.

As referred to above, the Narasimham Committee was constituted in 1991 relating to the financial system prevailing in the country. It considered wide-ranging issues relevant to the economy, banking and financing, etc. Under Chapter V of the Report under the heading “Capital Adequacy, Accounting Policies and other Related Matters”, it was opined that a proper system of income recognition and provisioning is fundamental to the preservation of the strength and stability of the banking system. It was also observed that the assets are required to be classified, it also takes note of the fact that Reserve Bank of India had classified the advances of a bank, one category of which was bad debts/doubtful debts. It then mentions that according to the international practice, an asset is treated as non-performing when the interest is overdue for at least two quarters. Income of interest is considered as such, only when it is received and not on the accrual basis. The Committee suggested that the same should be followed by the banks and financial institutions in India and an advance is to be shown as non-performing assets where the interest remains due for more than 180

days.

It was further suggested that Reserve Bank of India should prescribe clear and objective definitions in respect of advances which may have to be treated as doubtful, standard or substandard, depending upon different situations. Apart from recommending the setting up of Special Tribunals to deal with the recovery of dues of the advances made by the banks, the Committee observed that impact of such steps would be felt by the banks only over a period of time, in the meanwhile, the Committee also suggested for reconstruction of assets saying:

> "The Committee has looked at the mechanism employed under similar circumstances in certain other countries and recommends the setting up of, if necessary by special legislation, a separate institution by the Government of India to be known as 'Assets Reconstruction Fund' (ARF) with the express purpose of taking over such assets from banks and financial institutions and subsequently following up on the recovery of dues owed to them from the primary borrowers."

While recommending for setting up of Special Tribunals, the Committee observed:

> "Banks and financial institutions at present face considerable difficulties in recovery of dues from the clients and enforcement of security charged to them due to the delay in the legal processes. A significant portion of the funds of banks and financial institutions is thus blocked in unproductive assets, the values of which keep deteriorating with the passage of time. Banks also incur substantial amounts of expenditure by way of legal charges which add to their overheads. The question of speeding up the process of recovery was examined in great detail by a Committee set up by the Government under the Chairmanship of the late Shri Tiwari. The Tiwari Committee recommended, inter alia, the setting up of Special Tribunals which could expedite the recovery process…."

The Committee also suggested some legislative measures to meet the situation.

In its Second Report, the Narasimham Committee observed that NPAs in 1992 were uncomfortably high for most of the public sector banks. In Chapter VIII of the Second Report the Narasimham Committee deals about legal and legislative framework and observed:

> "*8.1.* A legal framework that clearly defines the rights and

liabilities of parties to contracts and provides for speedy resolution of disputes is a sine qua non for efficient trade and commerce, especially for financial intermediation. In our system, the evolution of the legal framework has not kept pace with changing commercial practice and with the financial sector reforms. As a result, the economy has not been able to reap the full benefits of the reforms process. As an illustration, we could look at the scheme of mortgage in the Transfer of Property Act, which is critical to the work of financial intermediaries...."

One of the measures recommended in the circumstances was to vest the financial institutions through special statutes, the power of sale of the assets without intervention of the court and for reconstruction of assets. It is thus to be seen that the question of non-recoverable or delayed recovery of debts advanced by the banks or financial institutions has been attracting attention and the matter was considered in depth by the Committees specially constituted consisting of the experts in the field. In the prevalent situation where the amounts of dues are huge and hope of early recovery is less, it cannot be said that a more effective legislation for the purpose was uncalled for or that it could not be resorted to. It is again to be noted that after the Report of the Narasimham Committee, yet another Committee was constituted headed by Mr Andhyarujina for bringing about the needed steps within the legal framework. We are therefore, unable to find much substance in the submission made on behalf of the petitioners that while the Recovery of Debts Due to Banks and Financial Institutions Act was in operation it was uncalled for to have yet another legislation for the recovery of the mounting dues. Considering the totality of circumstances and the financial climate world over, if it was thought as a matter of policy to have yet speedier legal method to recover the dues, such a policy decision cannot be faulted with nor is it a matter to be gone into by the courts to test the legitimacy of such a measure relating to financial policy."

In paragraphs 45 and 46, the Supreme Court adverted to the remedies available to the persons aggrieved by the proceedings initiated under the 2002 Act and observed:

"In the background we have indicated above, we may consider

as to what forums or remedies are available to the borrower to ventilate his grievance. The purpose of serving a notice upon the borrower under sub-section (2) of Section 13 of the Act is, that a reply may be submitted by the borrower explaining the reasons as to why measures may or may not be taken under sub-section (4) of Section 13 in case of non-compliance with notice within 60 days. The creditor must apply its mind to the objections raised in reply to such notice and an internal mechanism must be particularly evolved to consider such objections raised in the reply to the notice. There may be some meaningful consideration of the objections raised rather than to ritually reject them and proceed to take drastic measures under sub-section (4) of Section 13 of the Act. Once such a duty is envisaged on the part of the creditor it would only be conducive to the principles of fairness on the part of the banks and financial institutions in dealing with their borrowers to apprise them of the reason for not accepting the objections or points raised in reply to the notice served upon them before proceeding to take measures under sub-section (4) of Section 13. Such reasons, overruling the objections of the borrower, must also be communicated to the borrower by the secured creditor. It will only be in fulfilment of a requirement of reasonableness and fairness in the dealings of institutional financing which is so important from the point of view of the economy of the country and would serve the purpose in the growth of a healthy economy. It would certainly provide guidance to the secured debtors in general in conducting the affairs in a manner that they may not be found defaulting and being made liable for the unsavoury steps contained under sub-section (4) of Section 13. At the same time, more importantly, we must make it clear unequivocally that communication of the reasons for not accepting the objections taken by the secured borrower may not be taken to give occasion to resort to such proceedings which are not permissible under the provisions of the Act. But communication of reasons not to accept the objections of the borrower, would certainly be for the purpose of his knowledge which would be a step forward towards his right to know as to why his objections have not been accepted by the secured creditor who intends to resort to harsh steps of taking over the management/business of viz. secured assets without intervention of the court. Such a person in respect of whom steps under Section 13(4) of the Act are likely to be taken cannot be denied the right to know the reason of non-acceptance and of his objections. It is true, as per the provisions under the Act, he may not be entitled to challenge the reasons communicated or

the likely action of the secured creditor at that point of time unless his right to approach the Debts Recovery Tribunal as provided under Section 17 of the Act matures on any measure having been taken under sub-section (4) of Section 13 of the Act.

We are holding that it is necessary to communicate the reasons for not accepting the objections raised by the borrower in reply to the notice under Section 13(2) of the Act, more particularly for the reason that normally in the event of non-compliance with notice, the party giving notice approaches the court to seek redressal but in the present case, in view of Section 13(1) of the Act the creditor is empowered to enforce the security himself without intervention of the court. Therefore, it goes with logic and reason that he may be checked to communicate the reason for not accepting the objections, if raised and before he takes the measures like taking over possession of the secured assets, etc."

The constitutionality of Section 14 of the 2002 Act has also been upheld in Writ Petition No.26663 and 27553 of 2005 – **M/s. Siddhi Vinayaka Hotels (P) Ltd. v. The Union of India**, decided on 17.2.2006. The relevant portions of that judgment are extracted below:

"An analysis of the above reproduced provisions show that by virtue of non-obstante clause contained in sub-section (1) of section 13 any security interest created in favour of any secured creditor may be enforced without the intervention of the court or tribunal. In terms of sub-section (2) the secured creditor can issue notice to the borrower requiring the latter to discharge his liabilities within sixty days from the date of notice. Such notice is required to be delivered in accordance with Rule 3 of the Rules. On receipt of notice issued under sub-section (2), the borrower can make a representation or raise objection against the demand. The secured creditor is required to consider such representation or objection. If it is found that the representation or objection is not acceptable or tenable, then the secured creditor is duty bound to communicate the reasons for non-acceptance to the borrower. If the borrower fails to discharge his liability in full within a period of sixty days specified in sub-section (2), the secured creditor can take recourse to one or the other mode as specified in sub-section (4). One of the modes is to take over the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realizing the

secured asset. The secured creditor can also appoint any person to manage the secured assets of which possession has been taken over. Any person who may have acquired any of the secured assets from the borrower can also be called upon to pay such sum of money as may be sufficient to pay the secured debt. Section 14 (1) lays down that where the possession of any secured asset is required to be taken by the secured creditor or if any of the secured asset is required to be sold or transferred by the secured creditor, then he may, for the purpose of taking possession or control of any such secured asset make an application in writing to the Chief Metropolitan Magistrate or the District Magistrate within whose jurisdiction any such secured asset or other documents relating thereto is situated or is found for taking possession thereof. On receipt of such request, the Chief Metropolitan Magistrate or as the case may be, the District Magistrate shall take possession of the asset or document and forward the same to the secured creditor. Sub-section (2) of Section 14 empowers the Chief Metropolitan Magistrate or the District Magistrate to take appropriate steps or use, or cause to be used, such force, as may be necessary for taking possession of secured assets and documents relating thereto. Sub-section (3) of Section 14 declares that any action taken by the Chief Metropolitan Magistrate or the District Magistrate under Section 14 shall not be called in question by any court or before any authority. Section 17 which is captioned as “Right to appeal” lays down that any person (including the borrower) aggrieved by any of the measures taken under sub-section (4) of Section 13 by the secured creditor or his authorized officer can make an application to the Debts Recovery Tribunal within forty five days from the date of taking of such measures. Under sub-section (2) of Section 17 the Debts Recovery Tribunal is required to consider whether any of the measures taken by the secured creditor under sub-section (4) of Section 13 for enforcement of security is in accordance with the provisions of the Act and Rules made there under. If the Tribunal comes to the conclusion that such measure is not in accordance with the provisions of the Securitisation Act and the Rules, then it may require restoration of management of business to the borrower or restoration of possession of the secured assets and declare that the action taken by the secured creditor is invalid. The Tribunal can pass any other appropriate order in regard to the steps taken by the secured creditor under Section 13 (4). If the Tribunal declares that the action taken by the secured creditor is in consonance with sub-section (4)

of Section 13 then such creditor can take recourse to one or more of the modes mentioned in Section 13 for the purpose of recovery of secured debts.

A conjoint reading of Section 13 (4) and 14 makes it clear that the source of power to take possession of the secured assets of the borrower can be traced in Section 13 (4) and not under Section 14, which has been enacted as an aid for execution of the decision taken by the secured creditors to take possession of the secured assets or documents. To put it differently the substantive provision entitling the secured creditor to take possession of the secured assets is contained in Section 13 (4) and Section 14 merely contains a provision to facilitate taking over of possession without any impediment. If a person feels aggrieved by the action of the secured creditor to take possession of the secured asset, then he can file an application under Section 17 (1) before the Tribunal and the Tribunal can, after examining the facts and circumstances of the case and evidence produced by the parties declare that the action taken by the secured creditor is not inconsonance with Section 13 (4). The Tribunal can also direct the secured creditor to restore the possession of the secured assets of the borrower.

In view of the above analysis of the relevant provisions, we are inclined to agree with Shri Mohan Parasaran that right of appeal/representation available to the aggrieved person under Section 17 can be exercised as and when the secured creditor decides to take possession of the property. He can also challenge order passed by the Chief Judicial Magistrate or the District Magistrate, as the case may be, under section 14 of the Securitisation Act.

If Section 14 is read in the manner indicated above, it is not possible to accept the argument of the learned counsel for the petitioners that the same is violative of Article 14 of the Constitution."

In **M/s.Transcore v. Union of India and another**[2], the Supreme Court considered the question whether, during the pendency of an application filed under Section 19 of the 1993 Act, a secured creditor can resort to the provisions of the 2002 Act and answered the same in affirmative. After an in-depth analysis of the provisions of the two Acts, the Supreme Court laid down the following

propositions:

1) On reading Section 13(2), which is the heart of the controversy in the present case, one finds that if a borrower, who is under a liability to a secured creditor, makes any default in repayment of secured debt and his account in respect of such debt is classified as non-performing asset then the secured creditor may require the borrower by notice in writing to discharge his liabilities within sixty days from the date of the notice failing which the secured creditor shall be entitled to exercise all or any of the rights given in Section 13(4). Reading Section 13(2) it is clear that the said sub-section proceeds on the basis that the borrower is already under a liability and further that, his account in the books of the bank or FI is classified as sub-standard, doubtful or loss. The NPA Act comes into force only when both these conditions are satisfied. Section 13(2) proceeds on the basis that the debt has become due. It proceeds on the basis that the account of the borrower in the books of bank/ FI, which is an asset of the bank/FI, has become non-performing. Therefore, there is no scope of any dispute regarding the liability. There is a difference between accrual of liability, determination of liability and liquidation of liability. Section 13(2) deals with liquidation of liability. Section 13 deals with enforcement of security interest, therefore, the remedies of enforcement of security interest under the NPA Act and the DRT Act are complementary to each other. There is no inherent or implied inconsistency between these two remedies under the two different Acts. Therefore, the doctrine of election has no application in this case. Section 13(3) inter alia states that the notice under Section 13(2) shall give details of the amount payable by the borrower as also the details of the secured assets intended to be enforced by the bank/ FI. In the event of non-payment of secured debts by the borrower, notice under Section 13(2) is given as a notice of demand. It is very similar to notice of demand under Section 156 of the Income Tax Act, 1961. After classification of an account as NPA, a last opportunity is given to the borrower of sixty days to repay the debt. Section 13(3-A) inserted by amending Act 30 of 2004 after the judgment of this Court in **Mardia Chemicals** (supra), whereby the borrower is permitted to make representation/ objection to the secured creditor against classification of his account as NPA. He can also object to the amount due if so advised. Under Section 13(3-A), if the bank/FI comes to the

conclusion that such objection is not acceptable, it shall communicate within one week the reasons for non-acceptance of the representation/ objection. A proviso is added to Section 13(3-A) which states that the reasons so communicated shall not confer any right upon the borrower to file an application to the DRT under Section 17. The scheme of sub-sections (2), (3) and (3-A) of Section 13 of NPA Act shows that the notice under Section 13(2) is not merely a show cause notice, it is a notice of demand. That notice of demand is based on the footing that the debtor is under a liability and that his account in respect of such liability has become sub-standard, doubtful or loss. The identification of debt and the classification of the account as NPA is done in accordance with the guidelines issued by RBI. Such notice of demand, therefore, constitutes an action taken under the provisions of NPA Act and such notice of demand cannot be compared to a show cause notice. In fact, because it is a notice of demand which constitutes an action, Section 13(3-A) provides for an opportunity to the borrower to make representation to the secured creditor. Section 13(2) is a condition precedent to the invocation of Section 13(4) of NPA Act by the bank/FI. Once the two conditions under Section 13(2) are fulfilled, the next step which the bank or FI is entitled to take is either to take possession of the secured assets of the borrower or to take over management of the business of the borrower or to appoint any manager to manage the secured assets or require any person, who has acquired any of the secured assets from the borrower, to pay the secured creditor towards liquidation of the secured debt.

2) Reading the scheme of Section 13(2) with Section 13(4), it is clear that the notice under Section 13(2) is not a mere show cause notice and it constitutes an action taken by the bank/ FI for the purposes of the NPA Act. Section 13(6) inter alia provides that any transfer of secured asset after taking possession or after taking over of management of the business, under Section 13(4), by the bank/FI shall vest in the transferee all rights in relation to the secured assets as if the transfer has been made by the owner of such secured asset. Therefore, Section 13(6) inter alia provides that once the bank/FI takes possession of the secured asset, then the rights, title and interest in that asset can be dealt with by the bank/FI as if it is the owner of such an asset. In other words, the asset will vest in the bank/FI free of all encumbrances and the secured creditor

would be entitled to give a clear title to the transferee in respect thereof. Section 13(7) refers to recovery of all costs, charges and expenses incurred by the bank/FI for taking action under Section 13(4). Section 13(7) provides for priority in the matter of recovery of dues from the borrower. It inter alia provides for payment of surplus to the person entitled thereto. Section 13(8) inter alia states that if the dues of the secured creditor together with all costs, charges and expenses incurred are tendered to the secured creditor before the debt fixed for sale/transfer, the secured asset shall not be sold or transferred by the bank/FI to the asset reconstruction company and no further steps shall be taken in that regard. Section 13(9) inter alia states that where a financial asset is funded by more than one bank/FI or in case of joint financing by a consortium, no single secured creditor from that consortium shall be entitled to exercise right under Section 13(4) unless exercise of such right is agreed upon by all the secured creditors. Section 13(9) provides for one more instance when permission of DRT may be required under the first proviso to Section 19(1) of the DRT Act. The agreement between the secured creditors in such cases is required to be placed before the DRT not as a fetter on the rights of the secured creditors but out of abundant caution. Generally, such agreements are complex in measure, particularly because rights of each of the secured creditor in the consortium may be required to be looked into. However, if before the DRT, all the secured creditors in such consortium enter into an agreement under Section 13(9) then no such further inquiry is required to be made by the DRT. In such cases, the DRT has only to see that all the secured creditors in the consortium are represented under the agreement. The point to be noted is that the scheme of the NPA Act does not deal with disputes between the secured creditors and the borrower. On the contrary, the NPA Act deals with the rights of the secured creditors inter se. The reason is that the NPA Act proceeds on the basis that the liability of the borrower has crystallized and that his account is classified as non-performing asset in the hands of the bank/FI. Section 13(9) also deals with pari passu charge of the workers under Section 529-A of the Companies Act, 1956, apart from banks and financial institutions, who are secured creditors. Section 13(10) inter alia states that where the dues of the secured creditor are not fully satisfied by the sale proceeds of the secured assets, the secured creditor may file an application

to DRT under Section 17 of the NPA Act for recovery of balance amount from the borrower. Section 13(10), therefore, shows that the bank/ FI is not only free to move under NPA Act with or without leave of DRT but having invoked NPA Act, liberty is given statutorily to the secured creditors (banks/ FIs.) to move the DRT under the DRT Act once again for recovery of the balance in cases where the action taken under Section 13(4) of the NPA Act does not result in full liquidation of recovery of the debts due to the secured creditors. Section 13(10) fortifies our view that the remedies for recovery of debts under the DRT Act and the NPA Act are complementary to each other. Further, Section 13(10) shows that the first proviso to Section 19(1) of DRT Act is an enabling provision and that the said provision cannot be read as a condition precedent to taking recourse to NPA Act. Section 13(11) of the NPA Act inter alia states that, without prejudice to the rights conferred on the secured creditor under Section 13, the secured creditor shall be entitled to proceed against the guarantor/pledgor; that the secured creditor shall be entitled to sell the pledged assets without taking recourse under Section 13(4) against the principal borrower in relation to the secured assets under the NPA Act. Section 13(13) states that, no borrower shall, after receipt of notice under Section 13(2), transfer by way of sale, lease or otherwise any of his secured assets referred to in the notice, without prior written consent of the secured creditor. Thus, Section 13(13) further fortifies our view that notice under Section 13(2) is not merely a show cause notice. In fact, Section 13(13) indicates that the notice under Section 13(2) in effect operates as an attachment/ injunction restraining the borrower from disposing of the secured assets and, therefore, such a notice, which in the present case is dated 6.1.2003, is not a mere show cause notice but it is an action taken under the provision of the NPA Act.

3) Section 17(4) shows that the secured creditor is free to take recourse to any of the measures under Section 13(4) notwithstanding anything contained in any other law for the time being in force, e.g., for the sake of argument, if in the given case the measures undertaken by the secured creditor under Section 13(4) comes in conflict with, let us say the provision under the State land revenue law, then notwithstanding such conflict, the provision of Section 13(4) shall override the local law. This position also stands clarified by Section 35 of the NPA Act

which states that the provisions of NPA Act shall override all other laws which are inconsistent with the NPA Act. Section 35 is also important from another angle. As stated above, the NPA Act is not inherently or impliedly inconsistent with the DRT Act in terms of remedies for enforcement of securities. Section 35 gives an overriding effect to the NPA Act with all other laws if such other laws are inconsistent with the NPA Act. As far as the present case is concerned, the remedies are complimentary to each other and, therefore, the doctrine of election has no application to the present case."

In **Dr.Koppula Krishna and another v. State Bank of Hyderabad** (Writ Petition No.4858 of 2007) decided on 09.3.2007, this Court took cognizance of the recent judgment of the Supreme Court in **M/s.Transcore v. Union of India and another**[3] and rejected the plea that after having invoked the provisions of the 2002 Act, the bank is precluded from taking action under Section 19 of the 1993 Act.

Even after rejection of challenge to the vires of the 2002 Act, hundreds of adventurous petitions are instituted every year in various High Courts by the defaulters and their guarantors with the hope that somehow they will be able to persuade the Court to grant interim relief and thereby delay finalization of the proceedings instituted by the banks etc. This Court has dismissed dozens of such writ petitions mainly on the ground that the remedies available under Sections 17 and 18 of the 2002 Act read with Section 19 of the 1993 Act are equally efficacious.

We have prefaced disposal of this petition by making the above noted observations because, after hearing learned counsel for the parties and perusing the records, we are convinced that the prayer made by the petitioner for issue of a mandamus to respondent Nos.1 and 2 to invoke the powers vested in them under the 2002 Act

against the assets of respondent Nos.3 and 4 and also to quash possession notice dated 06.12.2003 is wholly meritless and the petition ought to have been dismissed at the threshold leaving the petitioner free to agitate all the points in O.A.No.45 of 2003 filed by State Bank of India (respondent No.2 herein) for recovery of its dues amounting to Rs.3,84,51,842/-.

Respondent No.3 – M/s.Rangoli Texdye Pvt. Ltd. is engaged in Polyester Yarn Dyeing in its factory situated at Dommadugu Village, Jinnaram Mandal, Medak District. Respondent No.4 – Ashish Maheshwari is a Chartered Accountant and promoter of respondent No.3. The petitioner's brother Chandrakant Sharda is one of the Directors of respondent No.3. In 1999, respondent No.3 availed cash credit loan of Rs.2,50,00,000/- from State Bank of India (Commercial Branch), Hyderabad (for short, 'the bank') on the personal guarantee of respondent No.4, petitioner Ashok Sharda, his brother Chandrakant Sharda and one Shri R.K. Maheshwari and hypothecation of the stocks in trade apart from mortgage by deposit of title deeds in respect of various properties including property bearing M.No.2-2-57/20, 2-2-57/20/1, 2-2-57/20/2 and 2-2-57/20/3 situated at Pan Bazar, Secunderabad.

Respondent No.3 and its guarantors did not repay the amount due to the bank in terms of the sanction. Therefore, the latter got issued legal notice dated 16.11.2002. Petitioner and his brother sent reply and denied their liability. After sometime, the bank filed an application under Section 19 of the 1993 Act for recovery of Rs.3,84,51,842/- with interest at the contractual rate of 14.25% per annum with quarterly rests. The same was registered as O.A.No.45 of 2003 and is pending before the Debts Recovery Tribunal, Hyderabad Bench (for short, 'the Tribunal').

During the pendency of the application before the Tribunal, the bank issued notice dated 6.8.2003 to the petitioner, his brother Shri Chandrakant Sharda, respondent No.4 and Shri R.K. Maheshwari under Section 13 (2) of the 2002 Act requiring them to pay Rs.3,84,51,842/- with further interest from 15.2.2003 and incidental expenses with an indication that if they fail to do so, action will be taken under Section 13 (4) and other provisions of the 2002 Act. On 6.11.2003, the petitioner's brother sent letter to the bank with the request to takeover possession of the factory assets, but neither he nor the petitioner bothered to repay the outstanding dues. Therefore, the authorized officer of the bank issued notice dated 6.12.2003 under Section 13 (4) read with Section 13 (12) of the 2002 Act and Rule 8 of the Security Interest (Enforcement) Rules, 2002 for taking possession of the mortgaged property. Immediately on receipt of the aforementioned notice, the petitioner filed this petition along with WPMP No.33962 of 2003 and succeeded in persuading the Court to pass order dated 31.12.2003, which reads as under:

> "The respondent bank may proceed with the impugned notice in accordance with law, but will not part with petitioner's assets by way of lease, assignment or sale and will not create any third party interest with the assets of the petitioner."

Notice of the writ petition was served on the bank sometime in January 2004, but till date the counter-affidavit has not been filed. At the hearing, Shri D. Raghavulu, Advocate appearing for Shri K.B. Ramanna Dora, counsel for the bank, made a statement that copy of the counter-affidavit is available in his file, but the same is not shown to have been filed in the Registry. Learned counsel for the petitioner also stated that he has not received copy of the counter-affidavit.

Shri T.V.L. Narasimha Rao made strenuous efforts to convince us that the adventurous litigation filed by his client is not without

reason. He vehemently argued that the functionaries of respondent Nos.1 and 2 i.e. Small Industries Development Bank of India and the bank have connived with respondent Nos.3 and 4 and deliberately omitted to recover the dues by disposing the assets of respondent No.3 and primary securities furnished by respondent Nos.3 and 4 and that the property of the petitioner was being targeted without any rhyme or reason, but we have not felt persuaded to accept his submission. Rather, we are convinced that this petition is one of many hundred such petitions instituted in different High Courts for frustrating the action initiated by the banks and financial institutions for recovery of their dues from those who take loans or avail credit facilities and those who guarantee repayment of the loan. The averments contained in para 8 of the affidavit filed by the petitioner suggesting that he was compelled to sign blank documents/papers on which the officers of the bank created securities in respect of property bearing M.No.2-2-57/20,
2-2-57/20/1, 2-2-57/20/2 and 2-2-57/20/3 situated at Pan Bazar, Secunderabad cannot be believed by any person of ordinary prudence. It is neither the pleaded case of the petitioner nor the learned counsel argued that his client is an illiterate or that he does not know the implication of signing certain documents vide which the immovable property was mortgaged to the bank for securing repayment of loan taken by respondent No.3. Therefore, the plea of innocence put forward by the petitioner cannot mislead us in believing that the petitioner had mortgaged immovable property without knowing its implications.

The argument of learned counsel for the petitioner that without disposing of the assets of respondent Nos.3 and 4, the bank cannot utilize other mortgaged properties is meritless and is liable to be

rejected. Neither the 1993 Act nor the 2002 Act contain any provision, which precludes or prohibits the banks or financial institutions or secured creditors from taking measures for recovery of their dues from the mortgaged assets simply because similar action has not been taken against the assets of the borrower or primary securities furnished by him. In the absence of such provision, there can be no justification for this Court's interdiction in the proceedings initiated by the bank under Section 13 (3) and (4) for recovery of its dues (as on date, the amount must be Rs.6 crores) by disposing of the properties mortgaged by the petitioner and others only on the ground that the assets of respondent Nos.3 and 4 have not been disposed of.

The judgments of the Supreme Court in **Pawan Kumar Jain v. Pradeshiya Industrial and Investment Corp. of U.P. Ltd.**[4] and **Ashok Mahajan v. State of U.P.**[5] on which reliance has been placed by Shri T.V. L. Narasimha Rao are clearly distinguishable. In both the cases, their Lordships of the Supreme Court interpreted the provisions contained in Uttar Pradesh Public Moneys (Recovery of Dues) Act, 1972 (for short, 'the U.P. Act') and held that in view of the explicit provision contained in Section 4 (2)(b), the financial institution cannot recover its dues from the mortgaged assets until the property of the principal debtor is sold off. The facts of **Pawan Kumar Jain**'s case (supra) were that Pradeshiya Industrial and Investment Corporation of Uttar Pradesh Limited had advanced loan to respondent No.4. The appellant stood guarantor in respect of the said loan. He challenged the recovery notice issued under the U.P. Act. The High Court dismissed the writ petition and the review petition. On appeal, the Supreme Court ruled that in view of the clear

provisions of the U.P. Act, the action against the guarantor cannot be taken until the property of the principal debtor is sold off. Section 4 of the U.P. Act, which was interpreted by the Supreme Court, reads thus:

> **4. Savings** .—(1) Nothing in Section 3, shall,—
>
> (*a*) affect any interest of the State Government, the Corporation, a government company or any banking company, in any property created by any mortgage, charge, pledge or other encumbrance; or
>
> (*b*) bar a suit or affect any other right or remedy against any person other than a person referred to in that section, in respect of a contract of indemnity or guarantee entered into in relation to an agreement referred to in that section or in respect of any interest referred to in clause (*a*).
>
> (2) Where the property of any person referred to in Section 3 is subject to any mortgage, charge, pledge or other encumbrance in favour of the State Government, the Corporation, a government company or banking company, then,—
>
> (*a*) in every case of a pledge of goods, proceedings shall first be taken for sale of the thing pledged, and if the proceeds of such sale are less then the sum due, then proceedings shall be taken for recovery of the balance as if it were an arrear of land revenue:
>
> Provided that where the State Government is of opinion that it is necessary so to do for safeguarding the recovery of the sum due to it or to the Corporation, government company or banking company, as the case may be, it may for reasons to be recorded, direct proceedings to be taken for recovery of the sum due, as if it were an arrear of land revenue before or at the same time as proceedings are taken for sale of the thing pledged;
>
> (*b*) in every case of a mortgage, charge or other encumbrance on immovable property, such property or, as the case may be, the interest of the defaulter therein, shall first be sold in proceedings for recovery of the sum due from that person as if it were an arrear of land revenue, and any other proceedings may be taken thereafter only if the Collector certifies that there is no prospect of realisation of the entire sum due through the first-mentioned process within a reasonable time."

After noticing the aforementioned provision, the Supreme Court held as under:

> "In our view, the above-set-out provisions of the U.P. Act are very clear. Action against the guarantor cannot be taken until the property of the principal debtor is first sold off. As the appellant has not sold the property of the principal debtor, the action against the appellant cannot be sustained. We, therefore, set aside the recovery notice."

Ashok Mahajan, who was appellant in the second case, questioned the action taken by Pradeshiya Industrial and Investment Corporation of Uttar Pradesh Limited to attach the mortgaged properties by contending that the Corporation should first recover its dues by disposing of the assets of the principal debtor. The High Court dismissed the writ petition. The Supreme Court reiterated the view taken in **Pawan Kumar Jain**'s case (supra) and held that the assets of the guarantor cannot be disposed of until the property of the principal debtor is sold off.

The 1993 and the 2002 Acts do not contain any provision analogous to Section 4 (2)(b) of the U.P. Act. Therefore, the ratio of the aforementioned judgments cannot be relied for nullifying the action taken by the bank under Section 13 of the 2002 Act qua the properties mortgaged by the petitioner.

In view of the above conclusion, we do not consider it necessary to deal with other issues raised by the petitioner moreso because O.A.No.45 of 2003 filed by the bank is pending adjudication before the Tribunal.

In the result, the writ petition is dismissed leaving the petitioner free to agitate all the points before the Tribunal.

While disposing of the writ petition in the manner indicated

above, we make it clear that the Tribunal shall decide the O.A. filed by the bank without being influenced by the observations made in this order.

As a sequel to dismissal of the writ petition, WPMP No.33962 of 2003 is dismissed and interim order dated 31.12.2003 is vacated.

WPMP No.20012 of 2007 filed by the petitioner for impleadment of Tahsildar, Secunderabad Mandal, Hyderabad District and six others as parties to the writ petition on the premise that the bank has created interest in their favour is dismissed with liberty to the petitioner to make appropriate application before the Tribunal in relation to the subject of the miscellaneous petition.

Before parting with the case, we consider it necessary to take notice of the disturbing phenomena that despite an unequivocal pronouncement of the Supreme Court in **CCE v. Dunlop India Ltd.**[6] that the High Courts should not exercise jurisdiction under Article 226 of the Constitution of India for interlocutory interventions when the main matter is pending before a competent adjudicatory forum created under a special statute, the proceedings initiated by the bank were partially stultified by interim order dated 31.12.2003. Not only this, even though the notice was served on the bank in January 2004, the counter has not been filed so far. This cannot be without reason. The person who was appointed as officer incharge of the case appears to have done so with the sole object of helping the petitioner. It is, therefore, necessary for the bank to conduct an enquiry into the matter of non-filing of counter in the writ petition for over three years. The failure of the bank to apply for vacating ad-interim order dated 31.12.2003 also calls for a serious probe. Therefore, Chairman, State Bank of India is directed to appoint a senior officer to hold a detailed enquiry into the failure of the officer

appointed to defend this writ petition to file counter-affidavit within reasonable time and take steps for persuading the Court to vacate the ad-interim order.

We also deem it proper to take suo motu cognizance of the failure of the Central Government to appoint a Presiding Officer of Debts Recovery Tribunal, Hyderabad. Learned members of the Bar, who have been appearing before the Hyderabad Bench of the Tribunal, are unanimous in making a complaint that there is no Presiding Officer for last more than one year and, on that account, the cases are being adjourned from time to time without any substantive proceedings. Let notice be issued to the Union of India to show cause as to why a mandamus may not be issued for appointment of the Presiding Officer of the Hyderabad Bench of the Tribunal.

Shri A. Rajasekhar Reddy, Assistant Solicitor General is directed to take notice and file reply as to why the Presiding Officer of the Tribunal has not been appointed for last one year.

The Registry is directed to register a separate case and list the same before the Court on 17.8.2007.

G.S. SINGHVI, CJ

July 27, 2007

C.V. NAGARJUNA REDDY, J

Note:

1) Registry to mark L.R. copy.

2) The Court Officer is directed to give attested copy of this Order to Shri A. Rajasekhar Reddy, learned Assistant Solicitor General.

(By order)

svs

[1] (2004) 4 SCC 311

[2] 2007 (1) ALD 109 (SC)

[3] 2007 (1) ALD 109 (SC)

[4] (2004) 121 Comp. Cases 758 (SC) = (2004) 6 SCC 758

[5] (2007) 137 Comp. Cases 704 (SC) = (2006) 10 SCC 332

[6] (1985) 1 SCC 260 = AIR 1985 SC 330